91-1245

Supreme Court, U.S.
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SUPREME COURT FOR THE
UNITED STATES OF AMERICA
October 1991 term

Case No. 90-8683

EDWARD JAMES DENNIS
Petitioner

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FOR THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Normando R. Pacheco #5296
1900 Grant St., #610
Denver, Colorado 80203
Telephone (303) 861-9200
Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. That pursuant to Rule 33 Federal Rules of Criminal Procedure the Appellant submits that the Trial Court failed to grant the Defendant's Motion To Suppress on the basis of insufficient probable cause in that the arrest of the Defendant was unlawful without probable cause and that search of the aircraft was based on pretext and without lawful justification.

2. That the Trial Court committed error in failing to protect the rights of the Defendant as required by Rule 16 of the Federal Rules of Criminal Procedure wherein as a result of the failure of the Government to provide the information as required by Local Rule and Order of Court the Defendant was denied his right to effective cross examination and assistance of counsel as required by the Fifth and Sixth Amendment to the United States Constitution.

3. That the Trial Court committed error in failing to sever the case of the Defendant Dennis from that of co-defendants as required by Rule 8 of the Rules of Criminal Procedure wherein it became clear that there were co-defendant statements which were admitted to establish their culpability which were inadmissible as a matter of law as required by United States v. James 590 F.2d 575.

4. That the Trial Court committed error in allowing the Jury to deliberate beyond a 8 hour time period of 2 successive days, and that as a result of the overworking of the Jury the Defendant was denied the right to have an impartial and detached Jury cooly and impartially deliberate without pressure of time thereby denying the defendant's rights to a Jury Trial As set forth by the Sixth Amendment.

5. That the Trial Court committed error in failing to direct a verdict as requested by the Defendant at the close of the Prosecutions case and therefore the verdict is contrary to the evidence and is insufficient as a matter of law to establish each and every necessary element of the offense beyond a reasonable doubt.

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel on behalf of the Appellant Edward James Dennis submits the following interested parties exist in the matter. Robert Harris Esq., on behalf of co-defendant Daniel Martin Perez and Aldo Olivas-Ruiz 1009 Montana El Paso, Texas; For the Defendant Dennis, Normando R. Pacheco and Mr. Daniel Anchondo Esq., 2500 Montana El Paso, Texas 79903; For the Government Leroy Morgan Jahn 727 E. Durango Blvd., A 601 San Antonio, TX 78206.

The Honorable Henry Politz Judge, United States Fifth Circuit Court of Appeals sitting by designation.

The Honorable Harry L. Hudspeth United States District Court Judge for the Western District of the State of Texas sitting in El Paso, Texas.

That the undersigned counsel submits that Robert Harris, counsel on behalf of Martin Perez and Aldo Olivas Ruiz does not participate in this Petition For Writ of Certiorari.

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PETITIONER'S STATEMENT CONCERNING JURISDICTION

Petitioner Edward James Dennis, by and through his attorney submits that jurisdiction before this Court is proper. This is an appeal timely brought by the Petitioner Edward James Dennis, and that the Petitioner has exhausted remedies both before the District Court for the Western District of Texas and that of the Fifth Circuit Court of Appeals.

DATE OF ENTRY OF JUDGEMENT

The Defendant was sentenced on October 29, 1990 to a period of 66 months in the Bureau of Prisons and subsequent thereto the Petitioner filed in a timely fashion Notice of Appeal and the matter was then transmitted to the United States Court of Appeals for the Fifth Circuit on January 1991.

DATE OF REHEARING

Petition For Rehearing was filed with the Fifth Circuit Court of Appeals by the Petitioner from a Opinion from the Fifth Circuit delivered on August 26, 1991 before Judges Jolly, Davis and Smith Circuit Court Judges thereof of that Court.

The Petitioner asserts that the original jurisdiction before the Fifth Circuit Court of Appeals was pursuant to Rule 4(b) Federal Rules of Appellate Procedure. By this Courts own Rule a petition For Writ of Certiorari to review a judgment of a United States Court of Appeals must be filed within 90 days of the entry of the judgement. The Petition For Rehearing was denied by the panel on October 7, 1991. Therefore the Petitioners Petition For Writ of Certiorari is well within the 90 days as provided by Rule 13 of the Supreme Court Rules of Procedure.

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LEGAL AUTHORITY

The Petitioner asserts that this Court has jurisdiction to review the judgment and opinion of the Fifth Circuit Court of Appeals wherein said decision is in conflict with both the United States Supreme Court Ruling in Napue v. Illinois 360 U.S. 264 and United States v. Giglio 405 U.S. 150.

Said decision therefore not being in conformity with the Supreme Court's prior opinions it is respectfully requested that the Court assume jurisdiction pursuant to Rule 10.1 (a) of the Rules of the Supreme Court.

STATEMENT OF FACTS

This is an Appeal from the Western District of Texas with the Trial held in El Paso, Texas. The Defendant was convicted after a Trial to a Jury of 12 with the verdict being returned on or about August 28, 1990. The Defendant appeals from a Jury Finding of guilty to Count 3 and 4 of the Indictment which alleged violation of 21 U.S.C. §846 and 841 (a) (1) Conspiracy to possess more than 100 kilograms of Marihuana and Count 4 being a violation of 21 U.S.C. §841 (a) (1) that the Defendant did possess with intent to distribute a quantity of more than 100 kilograms of Marihuana.

As a result of the conviction of the Defendant-Appellant Dennis he was sentenced to 66 months imprisonment on Count 3 and 66 months on Count 4 the same to be concurrently served. The Defendant timely filed a Notice of Appeal on November 13, 1990 and the Defendant remains on bond at the time of submission of this brief to the United States Supreme Court.

The first witness called at the Suppression Hearing held before the Honorable Harry Lee Hudspeth was Officer Davidson from the U.S. Customs Service. He indicated that on December 5, 1989 he received information concerning an airplane at the West Texas Airport. Supp. 4. He indicated, "I received information that an airplane had arrived." At that

time a question was posed by defense counsel concerning the basis of the information and the Court ruled that the identity was not an issue as it related to the Informant. The Court ruled as follows; "While you may like to know a lot of things, but your objection is overruled go ahead." Supp. pp.5. This matter is exceptionally important given the fact that on the time and date of the Hearing of April 27, 1990 both Officer Davidson and the U.S. Attorney who handled the Suppression Hearing were aware that the alleged informant had been paid $5,000 for the information. The Court's ruling therefore could have aided the issue at trial as will be set forth further in the Brief. Officer Davidson, continued his testimony and stated that based on the information he called Francine Tucker, who is manager of the West Texas airport. She indicated that a person known as Ed Dennis, the Petitioner, had paid cash for fuel and that the pilot Dennis, was interested in renting a hangar.

Davidson, further testified that his suspicion of the Appellant was that he was a business pilot and did not request a receipt, paid cash for gas and for hangar space. Supp. pp.7. The witness further testified concerning his approach to the aircraft hangar which was described as a shade hangar. When the witness approached and visibly searched the aircraft, no contraband was seen. Subsequent thereto on December 6, 1989 a pick-up truck arrived and the witness with night goggles observed a pick-up with three individuals. Boxes were being unloaded from the pick-up to the airplane. However, the Officer was unable to say with any certainty who was doing what.

The witness then approached the hangar area and stated he was going to conduct "a ramp check" pursuant to F.A.A. Regulation 6160. H. Supp. pp.9. From approximately 2-3 feet away from the airplane Davidson, indicated that he could smell the odor of Marihuana and according to him he obtained a consent to search which was given by co-defendant Olivas. The search and seizure resulted in the

confiscation of a substantial amount of Marihuana at which time the Defendant and co-defendants Ruiz, and Olivas were arrested.

Subsequent thereto and after an advisement the witness questioned the Appellant who denied any knowledge of the contents of the boxes and the suitcases containing the Marihuana. Supp. pp.11.

On cross examination the Informant Tucker, never observed any trafficking in drugs in regards to the airplane. The actual first observation of the witness Davidson concerning trafficking of narcotics was the odor of Marihuana. Supp. 15. The witness further stated that while he was observing the unloading of the pick-up truck he had no belief or suspicion that it contained contraband. Supp. pp. 18.

In regards to the pretext of the "ramp check" the witness indicated that he had never asked the pilot for a license at any point in time. That at the time of the initial arrival of Officer Carpenter, Stinett, and Davidson that each was armed and the witness Davidson was armed with an automatic machine gun which was drawn and pointed at the defendant. Supp. pp.19. Officer Davidson, described his fellow officers as being armed with a 12 gauge shotgun which was loaded and chambered and a hand gun possessed by a member of the Department of Public Safety for the State of Texas. Supp. 20. The weapons were drawn and pointed at both the defendant and co-defendants Supp. pp. 21.

As to the aircraft the witness indicated that Defendant-Appellant Dennis never gave permission to search and that no warrant was ever obtained based on the witnesses probable cause as he defined probable cause no warrant was required. Supp. pp.26. Subsequent to the search the Defendant Dennis was placed under arrest and advised by the Officer that he was arrested for smuggling but as the Officer indicated at the Suppression Hearing he had no prior information which would substantiate the Defendants

trafficking or smuggling. Supp. pp.31. As was eventually elicited on cross examination Officer Davidson testified that another person had given information concerning a pick-up which varied in description from that which appeared on the time and date of the seizure. He likewise acknowledged that his real purpose was to investigate and that the license check was pretext. Supp. pp.36. On recross Officer Davidson indicated that the Informant gave no information regarding drug trafficking Supp. pp.41 and as indicated above the record is entirely silent of the witness indicating to the Court as required by Rule 16 and the standing Order of Judge Hudspeth that a $5,000 cash payment had been made to Francine Tucker.

The next witness called was Francine Tucker, who was employed as an airport manager at the West Texas Airport who basically reiterated the information which was provided by Davidson, with some exceptions. She contradicted Davidson, where Davidson had testified that Tucker, had indicated to Davidson, that the Appellant Dennis was nervous. She denied giving this information Supp. pp.45. She likewise admitted it was not unusual for cash business to be transacted particularly since the airport encouraged a 5% discount per gallon for payment of cash. Supp. pp.46. She again reiterated that the defendant did not appear to be suspicious Supp. pp..47. or trafficking Supp. pp.47-50. Likewise this witness failed to disclose any payment made to her some 14 days after the seizure this amount being the sum of $5,000 which was paid by Officer Davidson, and by fellow Officer Santillano.

The next witness called was Robert Dyer, a lawyer from Colorado who was the owner of the Aircraft. While he denied giving express permission for the aircraft he did indicate that on prior occasions that the Appellant Dennis had the authority to use the aircraft. Supp. 55,66.

Dyer, likewise indicated that on prior occasions the Appellant Dennis had used the aircraft to travel to and from

El Paso, Texas and that the witness had never reported the aircraft as being stolen. Supp. pp.58-59.

The next witness called was Ken Carpenter, U.S. Customs Agent. Basically he reiterated the same information as Davidson in that he conducted surveillance with Offieer Davidson and indicated their initial purpose was to conduct "a ramp check" Supp. pp.64. Concerning any probable cause issues of unlawful activity "at that time we didn't have any idea who the specific people were. We knew which airplane we were interested in. In regards to the contents of the aircraft; Question: "And what were you expecting to find?" Answer: "We didn't have any idea what we were expecting to find." Supp. pp.67. Officer Carpenter likewise confirmed the testimony of Davidson that he was armed with a shotgun and sound of the click indicated to the Defendants that a round had been chambered. He contradicted Officer Davidson by stating that the boxes had the tops folded in and that the Marihuana was not in plain view. Supp. pp.70-72. He indicated and contradicted Officers Davidson that upon his arrival he didn't smell the odor of Marihuana due to a "sinus problem". Supp. pp.73. Cross examination by counsel for the defense indicated that the defendants were placed in a position where the defendants were not free to leave and therefore the Court can infer that this was an arrest. supp. pp.74. During this testimony an objection was made by defense counsel for the Appellant; Question: "Was that Informant given a reward in connection with this arrest?" Objection by Mr. Galenski, Assistant U.S. Attorney: "Excuse me this had nothing to do with the Suppression Hearing. I'm objecting" Mr. Pacheco: "It goes to whether or not there was sufficient probable cause to believe it in the first instance I think there is a different line of authority that deals with citizen informants that do it for a particular purpose to work off a case, or for the purpose of doing it for a reward." The Court: "Well if there was a confidential informant, the information that they received

from him or her it was so minor and trivial that it wouldn't make any difference anyway."

"So let's just pass on to something else. After hearing the testimony, the only thing that they had that was worth anything was what they got from the people that managed the airport, plus what they saw themselves anything that the Informant said was one of those isolated things in history that has no legal significance."

"I'm trying to quote from a Fifth Circuit case but I don't always do it real well."

It should be noted that prior to the testimony of both Tucker and Davidson a standing order had been issued by the District Court to the Office of the United States Attorney which provided in exact language that any information concerning renumeration as to Informants was to be provided by the Office of the U.S. Attorney. Mr. Galenski as it was later shown during the course of the trial as of this date was aware of the $5,000 payment to Ms. Tucker.

The next person called at the Suppression Hearing by the Government was Officer Ronnie Stinnett. Stinnett is employed by the Texas Department of Safety and assisted in surveillance. He indicated that when he approached the aircraft he opened the boxes in the aircraft which were sealed. Supp. pp.80. He indicated that his purpose in approaching the aircraft was to find out the contents of the baggage. Supp. pp.84. In regards to the pretext concerning the ramp check he indicated that in his 17 years of experience that he had never conducted a ramp check and nor was it customary for the Department of Public Safety Officers from the State of Texas to do the same. Supp. pp.86

The next person called was Agent Santillano, Officer Santillano was a special agent with the U.S. Customs Service in regards to the Appellant Dennis after an advisement pursuant to Miranda he questioned the appellant who denied knowledge of the contents of the box. Supp. pp.90. He

further stated that the co-defendant Martinez had indicated to him during the course of the interview that because of the showing of the guns and the loading of the guns that the co-defendant Martinez was afraid. Supp. pp.96. On cross examination during the interview of co-defendants neither indicated that the Defendant Ed Dennis knew as to the contents of the boxes. Supp. pp.99.

Agent Arispe was next called as a witness who testified concerning statements of the co-defendant as to their knowledge of the "load" which had been lost. He had no testimony concerning Defendant-Appellant Dennis.

Co-Defendant Martinez, testified that the boxes were closed and that there was no odor of Marihuana. Supp. pp.110.

Dennis likewise testified that there was no odor and denied the contents and knowledge were known to him on the time and date of his arrest. Supp. pp.126-128.

The Trial Court in a written motion denied the Suppression Hearing Finding that the Defendant-Appellant had no standing based on the fact that he had taken the aircraft without permission. P.8 54-61.

The Trial then commenced. In regards to the Severance Issue which was filed pursuant to Rule 8 the matter was argued immediately before the Trial and denied by the Trial Court. An offer of proof was then submitted to the Court. Mr. Pacheco: "In addition, there was a statement taken from one of the co-defendants which would go towards impeachment as to Mr. Dennis;" Volume 1 pp.3. The Court: "Then the Government has a bit of Bruton problem doesn't it, don't they?" Volume 1 pp.4. "Yes your Honor they have filed some motions responses to the motions that we filed. Likewise we have filed a Motion requesting that prior to the commencement of trial, a James Hearing take place to determine whether or not they are members of the same conspiracy. Likewise that was not ruled on by Judge Hudspeth. " The Court: "Let me say this in reference to

James I have written about James. I have struggled with that to make this very clear to the Government. You will put together what needs to be done for James, or by the end of the Trial I will instruct the jury not to pay any mind at all to anything that dealt with that question, and you run the risk of that instruction spilling over to the Jury not paying attention to a lot of good evidence."

"But the James requirement will be met. We are not going to have a mini trial on James, but all of the bits and pieces have got to be there to establish that there was indeed that conspiracy, that there was indeed the involvement of the Defendant in it, and that this statement was indeed made in furtherance of it."

"I'm not going to buck the En Banc Fifth Circuit." Vol. 1 pp.85.

The Trial record indicates that at no point in time did the Trial Court make a determination that the requirements of United States v. James had been met by the Government and the statements were given to the jury and testified to not only by the Officers from the U.S. Customs but one additional Officer who was a custodial agent for the Government as it related to the Defendants in this case.

In an effort to solve the problem concerning Bruton Counts 1 and 2 of the original Indictment were dismissed prior to the Trial by the Government as it related to the Appellant Dennis. As it related to time the Courts attention is directed to page 7 volume 1 in which the Court indicated that counsel were going to be required to have at least 8 hours inside courtroom time and that "This case will be finished tomorrow night. We will bring the second Jury in Wednesday morning, Madam Clerk, and then we will take it from there on the 3rd Jury." Volume 1 pp.8. The significance of this is the Appellant's contention that the Jury was overworked given the amount of the time that transpired on the first three days of Trial and their final arrival of a verdict at 9:05 p.m. on the third day of successive 8 to 9 hour

days of trial.

At the Trial itself Davidson testified initially for the Government and as indicated above never disclosed the payment. He likewise changed his testimony to indicate that upon his initial arrival that the Defendants were not free to leave. Supp. pp.94. Eventually the witness indicated that. Question: "Were Mr. & Mrs. Tucker paid for their services?" Answer: "Yes." Volume 1 pp.1. Question: "In all the reports that you have written, you have never indicated at all about anybody being paid for the information, have you?" Answer: "No." At that time an objection was made by Mr. Pacheco, "Judge at this point in time, I would ask sanctions be imposed against the Government because there is a standing order out of this jurisdiction that was entered by Judge Hudspeth at the commencement of this case, which indicted that the Government was to provide the defense in this case any renumeration to anybody that testified in this case. It was a standing order which obviously the Government has ignored." The Court: "The motion will be taken under submission." Volume 1 pp.104.

The next witness called was Stinnett, who reiterated the information of the Suppression Hearing that the boxes were closed and that no identification could be made of the Appellant Dennis loading or unloading boxes which was consistent with Officer Davidson and Officer Carpenter.

The Court then heard the Rule 16 violation argument. Volume 1 pp.133. The Court was referred to the Standing Order of Judge Hudspeth which in paragraph D, indicated "The Government shall disclose to the Defendant the existence of any payments, promises, or immunity, leniency, or preferential treatment made to perspective Government witnesses within the scope of the United States v. Giglio at 405 U.S. 150 and Napue v. Illinois 360 U.S. 264 I think we are entitled to that before the commencement of tomorrow's hearing." Mr. Serwatka U.S. Attorney "Your Honor this case

came to me last Friday and the remainder sometime during the course of today. That's the first I've ever heard that, witness was renumerated in any way." "The court will direct you to advise with members of your office who have knowledge about this and to make known to counsel information that information which is required by Judge Hudspeth early on." Volume 1 pp.134.

Officer Carpenter was next called by the Government who reiterated his testimony from the Suppression Hearing that he was unable to see those persons who were unloading and didn't observe the Defendant Dennis to be in the aircraft and that he in fact was standing near luggage; That the flap on the boxes in question were closed. Volume 2 pp.139-147. On cross examination Carpenter indicated that he was unable to corroborate the statements of Davidson concerning the odor and as set forth above couldn't indicate the Defendant had ever handled the cargo and that he had never in his prior experience performed a ramp check before. Volume 2 pp.155. Further in this context Carpenter indicated that he couldn't state that the Defendant had ever handled cargo and that he had never performed a ramp check before Volume 2 pp.155. That in a simple ramp check no weapons had ever previously been utilized and as it related to the Informant Tucker, that she had never indicated to himself or to any other of the other officers that she could make an identification of the contents of the boxes nor could she indicate any suspicious conduct.

The Government next called Fred Schroder U.S. Customs Agent who performed the presumptive tests on the Marihuana. Volume 2, P 8 171.

The next person was Juan Arispe who testified concerning the statements of co-defendant Ruiz regarding smuggling and at this point in time contrary to the prior Ruling of Court the Trial Court failed to indicate on the record whether or not the requirements of United States v. James had been met sufficiently so as to allow a co-

conspirator statement to be utilized in evidence and further there is no finding in the record by the Trial Court that the defendant Dennis was in fact a co-conspirator as it related to Olivas as it related to the issue of smuggling. Volume 2 pp.178-179. This is further emphasized by the fact that immediately prior to Trial as indicated above Counts 1 and 2 which were the smuggling counts were dismissed by Order of Court as it related to the Defendant and the Trial Court failed to properly admonish the Jury that the statement was not to be taken as evidence against the Defendant Dennis.

Agent Santillano was next called and basically reiterated the information concerning the statement of co-defendant Martinez, "that we had lost a lot of stuff". Volume 2 pp.19.

As indicated above when Santillano testified there was no advisement by the Trial Court concerning the James requirement and that the statement was not to be used as any inference of guilt as related to the Defendant Dennis. Volume 2 pp.208.

Santillano, testified that subsequent to a Miranda warning to the defendant appellant Dennis that Dennis indicated that he was unaware of the contents of the airplane or the baggage or the luggage or boxes which were seized. Santillano, then testified concerning the search of a hangar in Denver which belonged to the Appellant Dennis and the substance of the search indicated no narcotics, contraband or evidence of drug trafficking. Volume 2 pp.216. That as it related to the van of the co-defendant purchased some three weeks preceding likewise no contraband was found in the vehicle. Volume 2, pp.217.

As it related to the Informant Tucker, he indicated that he was well aware of the amounts of money. Question: "When is the first time you found out that she got paid $5,000 for this information?" Answer: "Well first of all I paid her." Question:"So you've known all along?" Answer: "Well I didn't know until probably December 10th, 11th,

12th when I got down to talking to pilot Davidson, who the Informant was." Question: "And you were aware of the Standing Order by a Federal Judge here that you were supposed to give that information over to the Defendant?" Answer: "No sir yesterday was the first time I heard about it." Question: "You never heard of the Standing Order by Judge Hudspeth. Right?" Answer: "No sir." On further cross examination the Officer indicated there was no prior information concerning Appellant Dennis as to any drug trafficking. Volume 2 pp.224. During the further course of testimony concerning Tucker the agent indicated the following; Question: "As it related to Tucker. Was she documented as a Confidential Informant?" Answer: "Yes she was documented by Mr. Galenski. " Volume 2 pp.243.

The Court then next conducted an inquiry concerning the reward as follows; Question: "What is the practice about informing the United States Attorney that this has been done in an instance where the matter has been taken before the Grand Jury so that they will know that a witness, after being brought before the Grand Jury has received payment and certainly if an Indictment is returned, and informing the U.S. Attorney that a witness that may be called to testify at a trial has received money?" Answer: "Mr. Galenski, the U.S. Attorney that was handling this case was aware of the Informant." Question: "At what point was he made aware of the Informants status and that the money was paid?" Answer: "He didn't know the money was paid. He was aware that Mrs. Tucker, was an Informant." Question: "Is it the practice of the Customs Service to purposely and intentionally not to inform the U.S. Attorney about this?" Answer: "There is nothing in our guidelines that says we have to inform the U.S. Attorney on payment to confidential informants." Volume 2 pp.243-244. Question by the Court: "Well, let one signal go forward to the Customs Service from one Judge." Answer: "Yes sir." Question: "That's incredible not to advise the United States Attorney so that

the United States Attorney may take the appropriate steps to handle that matter with reference to that witness, in a case of this kind where the Court Ordered the U.S. Attorney to make known if any witness had received any compensation of any kind for their participation or their assistance." Volume 2 pp.244.

From the Court's inquiry Defense on behalf of Dennis, then moved to strike the testimony of all witnesses who were made aware of the payments. Co-counsel Anchondo: "May I address the Court on just one matter? as a matter of law, of course all the items that were requested to be given to defense counsel and is not usually excluded and kept away from the Jury Your Honor, and for this reason we would ask that all statements made by Mrs. Tucker, and all the Agents that were aware of the $5,000 payment be stricken." The Court: "I don't blame you for making that Motion, but it will not be granted. Motion Denied." Volume 2, P 8 255.

Elmer Zwier, U.S. Customs Agent had testified concerning the search of the hangar in Denver at Centennial Airport and of the Van who likewise confirmed Agents Santillano that no drugs, contraband or drug records were found at that location. Volume 2 pp.263-264. At the end of Agents testimony the Government rested. Volume 2 pp.276. A request for directed verdict was made by each of the individual Defendants which was denied by the Trial Court. Volume 2 pp.282.

The Court in its Ruling indicated that the judgments under Rule 29 of the Federal Rules of Criminal Procedure each in a sense will be denied. "There is in this case, as I view it a very very large credibility call and that is the province of the Jury. I'm trained as a civilian. It would be no problem at all for me to Rule. But a civilian has to learn, when he is in Federal Court, that the Seventh Amendment is the Seventh Amendment and the Fifth Amendment is the Fifth Amendment and Article 3 is Article 3. And that is, in criminal cases Trial by Jury."

"And the quintessential duty of a jury is to make credibility calls, and that will have to do in this case. The Motions are denied. Your positions are protected with reference to future submissions." Volume 2 pp.299.

Based on the Courts statement concerning credibility the following statements and issues presented for review need to be determined on the basis of the record by the Fifth Circuit Court of Appeals.

ARGUMENT

The Petitioner asserts that the Opinion of the Fifth Circuit is in direct contradiction to Rule 16 of the Rules of Criminal Procedure and further that the Opinion as delivered by the Fifth Circuit is contrary to prior case law of the Fifth Circuit concerning disclosure of evidence prior to trial particularly United States v. Bagley 473 U.S. 667(682) Giglio v. United States 405 U.S. 150 and Napue v. Illinois 360 U.S. 264 the Court in its Opinion reaffirms Hill v. Black 887 F.2d 513, page 517 Fifth Circuit 1989 where it indicates that nondisclosure of an agreement or understanding does not violate the spirit and intent of prior case law as long as the agreement or understanding is disclosed to the defense before the end of trial." Fifth Circuit Court Opinion at page 11. As submitted above in the Statement of facts there was a standing order based on Napue and on Giglio entered by the District Court requiring within the time period specified by the Court which was some 90 days before trial that any agreements as to payments of Informants was to be disclosed to trial counsel. Therefore the Opinion of the Fifth Circuit does not address the issue as to whether or not the violation of time parameters as set forth by the District Court for the Western District of El Paso is still in compliance with Hill v. Black. A review of both Hill and Giglio clearly indicate that there was no standing order entered by a District Court which the Government then violated by not timely filing as required by Order of Court. Therefore this leaves open the

question for this Court to address as to whether fundamental due process was afforded to Defendant Dennis and whether or not the Courts Opinion concerning Napue can be reaffirmed under the facts of United States of America v. Dennis, the matter before this Court.

As to the issues concerning the search and arrest of the defendant the Opinion as delivered by the Fifth Circuit Court of Appeals is contrary to United States v. Zukas 843 F. 2d 179 which like the matter before this Court was a ramp check search. However in Zukas there was additional probable cause for the Officer upon which to rely in that there was "a courier profile" which enhanced from mere suspicion to that of probable cause as set forth by that Opinion. This case was analyzed under the Courts Opinion of United States v. Berry which developed a three tier process to determine whether or not a search and arrest had occurred. Based on the facts of this case and as acknowledged in the Governments brief before the Fifth Circuit an arrest did preceed the search and Officers were all armed and restricted movement considerable thereby evoking the Fourth Amendment as set forth by Berry. See also United States v. Mendenhall 446 U.S. 554,100 SC 1877.

In regards to the issue concerning sufficient evidence the Opinion in the Fifth likewise is in contravention to United States v. Juarez Fierro 935 F.2d 672 which requires that there must be an act perpetrated in furtherance of a transfer or a sale as to the allegations as charged. A review of the record and of the Opinion of the Court of the Fifth Circuit indicates that the Court found no overt act which would be consistent with the defendant's intentions to distribute Marihuana nor does the evidence show that as required under Juarez Fierro. 935 F.2d 677 The Opinion of the Fifth Circuit in the matter before this Court likewise is violative of United States v. James 590 F.2d 575 which requires that in weighing the admissibility wherein the defendant has moved for a severance pursuant to Rule 8

F.R.Cr.P that when out of court statements or statements of co-conspirators must be admitted it must be a declaration by one defendant which is admissible against another defendant only when there is a sufficient showing by independent evidence of a conspiracy when one or more or other defendant and the declarant and if the declarations at issue were in furtherance of that conspiracy, and as a preliminary matter there must be a substantial independent evidence of a conspiracy at least enough to take the question to the Jury quoting United States v. Nixon 418 U.S. 683, 701 and note 14 (1974) a review of the record indicates that the Trial Court can not make any such finding before the admissibility of a statement which was to the effect "we had much stuff". Based on the above and foregoing it is respectfully requested that a Petition for Writ of Certiorari be granted to the Petitioner Edward James Dennis from this case in the Fifth Circuit Court of Appeals and to allow this Court to review the propriety of the Fifth Circuit Court of Appeals determination in 90-8683.

Respectfully submitted this 13th day of Nov. 1991.

Normando R. Pacheco
1900 Grant St., #610
Denver, Colorado 80203
Telephone: (303) 861-9200

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CURCUIT

No. 90-8683

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DANIEL MARTINEZ-PEREZ and
EDWARD JAMES DENNIS,

Defendants-Appellants.

Appeals from the United States District Court for the
Western District of Texas

ON PETITION FOR REHEARING

( )

Before JOLLY, DAVIS and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed, on behalf of Edward James Dennis, in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT

Dated: Sept. 30,1991

U.S. v. MARTINEZ-PEREZ

UNITED STATES of America,
Plaintiff-Appellee,
v.
Daniel MARTINEZ-PEREZ and Edward James Dennis,
Defendants-Appellants.

No. 90-863
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Aug. 26, 1991.

Defendants were convicted by jury in the United States District Court for the Western District of Texas, Henry A. Politz, Circuit Judge, of conspiracy and possession of marijuana with intent to distribute, and they appealed. The Court of Appeals held that: (1) defendants' Fourth Amendment rights were not violated when they were arrested and marijuana was discovered in and around airplane; (2) convictions were supported by evidence; (3) defendant was not entitled to severance of his trial from that of coconspirators; and (4) Government's failure to disclose before trial that airport manager and her husband had been paid for information they furnished regarding defendant's conduct at airport did not violate defendant's rights under Constitution or criminal rule.

1. Criminal Law 1139, 1158(2)

Court of Appeals reviews district court's findings of fact under clearly erroneous standard and reviews de novo the ultimate conclusion of whether Fourth Amendment was

violated. U.S.C.A. Const. Amend. 4.

2. Arrest 63.5(7)

Three tiers of police-citizen contact apply to searches of aircraft involving "ramp check" procedures designed to check licensing and certification to insure compliance with Federal Aviation Administration (FAA) regulations: communications, investigatory stops, and arrest. U.S.C.A. Const. Amend. 4.

See publication Words and Phrases for other judicial construction and definitions.

3. Customs Duties 126(4)

Customs agents and Texas Department of Public Safety Inspector had reasonable suspicion justifying their initial approach of aircraft, brandishment of weapons, and announcement of their intention to conduct ramp check, and that reasonable suspicion ripened into probable cause justifying warrantless search of aircraft when agent smelled marijuana; pilot had requested closed space at airport from which he could fly at any time of day or night, paid in cash and declined airport manager's offer of receipt, and had removed seats from his aircraft, onto which cargo was being loaded very early in the morning. U.S.C.A. Const. Amend. 4.

4. Criminal Law 1159.2(7)

Standard of review of sufficiency of the evidence is whether, considering all the evidence in light most favorable to the prosecution, rational fact finder could have found defendant guilty beyond a reasonable doubt based upon evidence presented at trial.

5. Drugs and Narcotics 73

"Possession" element of narcotics count may be shown through constructive possession, which includes

exercising dominion or control over controlled substance. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

6. Conspiracy 47(12)
Drugs and Narcotics 123(2)

Conviction of conspiracy to possess and possession of marijuana with intent to distribute was supported by evidence that defendant arranged for storage of aircraft, exercised control over aircraft, had prior contact with truck carrying marijuana, loaded marijuana into aircraft, and engage in concerted action with other people in that loading. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401(a)(1), 406, 21 U.S.C.A §§ 841(a)(1), 846.

7. Criminal Law 622

General rule that defendants who are indicted together should be tried together is especially strong when defendants are charged with committing the same conspiracy.

8. Criminal Law 1148

Abuse of discretion is standard of review for district court's denial of motion for severance.

9. Criminal Law 622.3

Defendant arguing for severance of trial from that of coconspirators on basis of possibility that coconspirator's out-of-court statements may be admitted into evidence must specifically identify the particular statement he is challenging.

10. Criminal Law 622.2(9)

Defendant in narcotics conspiracy prosecution was not entitled to severance of his trial from that of coconspirators on basis of coconspirator's ambiguous

statement that "we had much stuff," especially in light of other evidence against defendant. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

11. Constitutional Law 268(5)
Criminal Law 641.12(1), 700(5)

Government's failure to make pretrial disclosure of payment to airport manager and her husband for information regarding narcotics defendant's conduct at airport did not violate *Brady* rule, due process, or right to effective assistance of counsel; payment was disclosed to defendant and jury during trial, and there was no reasonable probability that jury's verdict would have been different had information been disclosed earlier, especially in light of relatively unimportant nature of information vis-a-vis elements of offenses. U.S.C.A. Const. Amends. 5, 6.

12. Criminal Law 627.8(6)

District courts have broad discretion in determining appropriate sanction for violation of discovery order. Fed.Rules Cr. Proc.Rule 16, 18 U.S.C.A.

13. Criminal Law 627.8(6)

District court did not abuse discretion in refusing to strike testimony of airport manager and her husband based on Government's violation of standing discovery order through failure to timely disclose payment to airport manger and her husband for information they had furnished regarding defendant's conduct at airport. Fed.Rules Cr.Proc.Rule 16, 18 U.S.C.A.

14. Criminal Law 865(2)

Defendant failed to show that district court abused its discretion by allowing jury to deliberate beyond eight-hour time period for two successive days or that verdicts

were coerced by fatigue; court had informed jury that it should indicate if it needed break and that one would be taken.

Appeals from the United States District Court for the Western District of Texas.

Before JOLLY, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:

Daniel Martinez-Perez (Martinez) and Edward Dennis appeal their convictions of conspiracy to possess, and possession of, marihuana, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Finding no error, we affirm.

I.

A jury found Dennis, Martinez, and Aldo Olivas-Ruiz guilty of conspiracy and possession with intent to distribute marihuana. The jury also found Martinez guilty of conspiracy to import and importation of marihuana. The appeals of Dennis and Martinez are before us now.

II.

[1] Dennis and Martinez argue that their fourth amendment rights were violated when they were arrested and marihuana was discovered in and around an airplane in the West Texas Airport near El Paso, Texas. We review the district court's findings of fact under the clearly erroneous standard and review *de novo* the ultimate conclusion of whether the fourth amendment was violated. *United States v. Colin*, 928 F.2d 676, 677-78 (5th Cir. 1991).

Some of the facts surrounding the incidents are not disputed. Dennis asked Francine Tucker, the airport's

manager, whether he could rent a closed hanger. Such shelter was not available, so Dennis rented a shade, which consists of a roof and four open sides. He paid cash for the space rental and for the fuel, receiving a cash discount for the fuel. Tucker offered to give him receipts for the transactions, but he declined.

Dennis said that he planned to leave the airport at various hours during the day or night. Tucker went out to the shade, looked into the aircraft, and noticed that some of the seats had been removed. She became suspicious and contacted her husband, who contacted United States Customs Agent R. James Davidson.

Davidson and his partner, Agent Kenneth Carpenter, examined the aircraft and noticed that there were no seats in the rear portion. Davidson received information from an unnamed confidential source that Dennis had recently met at the airport with two Hispanic males who were driving a large dark pickup truck. Davidson, Carpenter, and Texas Department of Public safety Inspector Ronnie Stinnett established surveillance of the aircraft. At approximately 5:45 a.m. on December 6, 1989, Davidson saw a dark pickup truck driving toward the aircraft. Three men got out of the pickup, unloaded cargo, and began placing it on the aircraft. Davidson, Carpenter, and Stinnett approached the aircraft. Davidson was armed with a machine gun, Carpenter was carrying a shotgun, and Stinnett held a handgun. Dennis, Olivas, and Martinez were in or near the aircraft.

The parties dispute what occurred next. According to the officers' testimony, Davidson announced that he was a customs officer and that he was going to conduct a "ramp check," a procedure designed to check licensing and certification to ensure compliance with Federal Aviation Administration (FAA) regulations. *See United States v. Zukas*, 843 F.2d 179, 181 (5th Cir. 1988), *cert. denied*, 490 U.S. 1019, 109 S.Ct. 1742, 104 L.Ed2d 179 (1989).

Davidson testified that he smelled marihuana when he was about two to three feet from the airplane. Stinnett testified that he smelled the marihuana as he approached the aircraft. Carpenter testified that he could not smell the marihuana at that time but that he has a chronic sinus problem that inhibits his ability to smell.

Davidson testified that as he looked inside the plane, he saw containers of marihuana wrapped in cellophane. He asked generally to whom the packages and nearby suitcases belonged, but no one replied. After obtaining Olivas's consent to search the containers, the agents did so, and found marihuana. According to the officers, at that time they arrested Dennis, Martinez, and Olivas, handcuffed them, and placed them in police cars.

Martinez and Olivas testified that they were handcuffed immediately after the officers approached the aircraft. Olivas testified that the officers then threw him down and put a foot on his back. The district court did not credit these aspects of the defendants' testimony. Especially in light of the officers' testimony, these findings of fact are not clearly erroneous. *See Colin*, 928 F.2d at 677.

[2] Dennis argues that he was arrested without probable cause and that the results of the ensuing search should be suppressed as fruits of the poisonous tree. The three *Berry* tiers of police-citizen contact apply to searches of aircraft involving ramp checks. *Zukas*, 843 F.2d at 181-82. *See United States v. Berry*, 670 F.2d 583, 591 (5th Cir. 1982) (en banc).

> The first tier, communication between police and citizens, involves no coercion or detention and does not implicate the fourth amendment. An investigatory stop, at the second level of contact, is a brief seizure that must be supported by reasonable suspicion, that is 'specific and articulable facts, which taken together with rational

> inferences from these facts reasonably warrant an intrusion.' Finally, a full scale arrest must be supported by probable cause.

Zukas, 843 F.2d at 181-82 (citation omitted) (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968)).

> In *Zukas*, we held that
> when the police officers parked their car in front of the plane, approached the pilot and asked for identification and registration papers, then informed him without returning those papers, that he was suspected of smuggling drugs, the police-citizen contact constituted more than mere communication. . . . [A]t this point a fourth amendment seizure occurred.

Id. at 182. We also held that this seizure constituted a *Terry* stop requiring only reasonable suspicion, not a *de facto* arrest. *Id.*

[3] *A fortiori*, in the instant case, reasonable suspicion was, at most, all that was required when the officers approached the aircraft, brandished their weapons, and announced their intention to conduct a ramp check. At this point, the officers had reasonable suspicion, including specific and articulable facts that an intrusion was warranted. Dennis had requested a closed space from which he could fly at any time of the day or night. he paid in cash and declined Tucker's offer of a receipt. Seats from his aircraft had been removed. Cargo was being loaded onto the aircraft very early in the morning.

The district court correctly concluded that, when Davidson smelled marihuana, his reasonable suspicion ripened into probable cause, justifying the warrantless search of the aircraft. *United States v. Marshall*, 878 F.2d 161, 163,

(5th Cir. 1989); *United States v. McDaniel*, 550 F.2d 214, 218 (5th Cir. 1977). Therefore, we need not address the defendants' arguments concerning concerning whether the district court erred by determining that they lacked standing to assert their fourth amendment rights and whether the consent to search was valid.

III.

[4,5] Dennis contends that the evidence is insufficient to support his convictions. the standard of review is whether, considering all the evidence in the light most favorable to the prosecution, a rational factfinder could have found the defendant guilty beyond a reasonable doubt, based upon the evidence presented at trial. *United States v. Bell*, 678 F.2d 547,549 (5th Cir.1982) (en banc), *aff'd*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983). As to the substantive count, the government had to prove beyond a reasonable doubt that Dennis knowingly possessed marihuana and had an intent to distribute it. The "possession" element may be shown through constructive possession, which includes exercising dominion or control over the controlled substance. *United States v. Juarez-Fierro*, 935 F.2d 672, 677 (5th Cir. 1991). Distribution for these purposes includes "'acts perpetrated in furtherance of a transfer or sale. . . .'" *United States v. Lechuga*, 888 F.2d 1472, 1478 (5th Cir.1989) (quoting *United States v. Brunty*, 701 F.2d 1375, 1381 (11th Cir.), *cert. denied*, 464 U.S. 848, 104 S.Ct. 155, 78 L.Ed.2d 143 (1983)). As to the conspiracy count, the government had to prove beyond a reasonable doubt that Dennis agreed with at least one person to commit the substantive count, that Dennis knew of the conspiracy and intended to joint it, and that Dennis participated in the conspiracy. *See Juarez-Fierro, 935 F.2d at 677.*

[6] Dennis argues that the evidence shows nothing more than his mere presence at the scene. The evidence,

viewed in the light most favorable to the prosecution, shows far more. Dennis's arrangements for the storage of the aircraft, his exercise of control over it, his prior contact with what may have been the truck carrying the marihuana, the loading of marihuana into the aircraft, and his apparent concerted action with other people in loading it allowed a rational trier of fact to find beyond a reasonable doubt that Dennis conspired to and did possess the marihuana with the intent to distribute it.

IV.

[7] Dennis argues that the district court erred by denying his motion to sever his trial from Olivas's and Martinez's. In general, defendants who are indicted together should be tried together. *United States v. Arzola-Amaya,* 867 F.2d 1504, 1516 (5th Cir.), *cert. denied,* ---U.S.---, 110 S.Ct. 322, 107 L.Ed.2d 312 (1989). This rule is especially strong when the defendants are charged with committing the same conspiracy. *United States v. McGuire,* 608 F.2d 1028, 1031 (5th Cir. 1979), *cert. denied,* 446 U.S. 910, 100 S.Ct. 1838, 64 L.Ed.2d 262 (1980). Dennis, Olivas, and Martinez were indicted together for the same conspiracy.

[8] Abuse of discretion is the standard of review for a district court's denial of a motion for severance. *United States v. DeVarona,* 872 F.2d 114, 120 (5th Cir. 1989). To demonstrate such an abuse, Dennis would have to show that: "(1) the joint trial prejudiced him to such an extent that the district court not provide adequate protection; and (2) the prejudice outweighed the government's interest in economy of judicial administration." *Id.* at 120-21.

Dennis relies upon *United States v. James,* 590 F.2d 575 (5th Cir.) (en banc), *cert, denied,* 442 U.s. 917, 99 S.Ct. 2836,61 L.Ed.2d 283 (1979). But *James* addressed not when defendants must be severed from joint trials, but when out-of-court statements of co-conspirators may be admitted

into evidence. *James*, 590 F.2d at 577. Under *James*,

> a declaration by one defendant is admissible against other defendants only when there is a 'sufficient showing, by the independent evidence, of a conspiracy among one or more other defendants and the declarant and if the declaration at issue were in furtherance of that conspiracy,' and . . . 'as a preliminary matter, there must be *substantial, independent* evidence of a conspiracy at least enough to take the question to the jury.'

Id. at 581 (internal citation omitted) (quoting *United States v. Nixon*, 418 U.S. 683, 701 & n. 14, 94 S.Ct. 3090, 3104 & n. 14, 41 L.Ed.2d 1039 (1974)).[1]

[9,10] An appellant making a *James* argument must specifically identify the particular statement he is challenging. *United States v. Valdez*, 861 F.2d 427, 432 (5th Cir. 1988), *cert. denied*, 489 U.S. 1083, 109 S.Ct. 1539, 103 L.Ed.2d 844 (1989). The only statement of a co-conspirator that Dennis identifies in connection with his *James* argument is Martinez's statement that "we had much stuff".[2] Dennis argues that the "we" referred included him, and he implicitly argues that the "stuff" was the marihuana. Given the ambiguity of the statement, and especially in light of the other evidence against Dennis, he has not shown that any *James* problem created so much prejudice that it outweighed the government's interest in judicial economy. Therefore,

1. *United States v. Chestang*, 849 F.2d 528, 531 (11th Cir. 1988), states that "*James* has been overruled to the extent that it did not allow district courts, in making preliminary factual determinations . . ., to examine the co-conspirator statements sought to be admitted." *See Bourjaily v. United States*, 483 U.S. 171, 178-79, 107 S.Ct. 2775, 2780-81, 97 L.Ed.2d 144 (1987).

2. Customs Service Special Agent Quirino Santillano testified that, after Martinez was arrested, he said "Traiamo[s] mucha[s] cosa[s]," which Santillano translated as "We had a lot of stuff."

Dennis has not shown that the district court abused its discretion in denying his motion for severance. *See DeVarona*, 872 F.2d at 120.

V.

At trial, police officers testified that Mr. and Mrs. Tucker had been paid $5,000 for the information they had furnished regarding Dennis's conduct at the airport. The money was given as a reward; before they provided the information, they were not told that they could be paid anything for it. The Assistant United States Attorney stated that he had not known about the payment. The officer who made the payment testified that he did not tell the prosecutors about the payment. Dennis's attorney argued that the government's failure to disclose that payment before trial violated the district court's standing order regarding disclosure of information to the defense. The district court explored the issue at length and admonished the government for not disclosing the information in a timely manner. Dennis moved to strike all statements made by Tucker and any agent who was aware of the payment; the district court denied the motion.

[11] On appeal, Dennis argues that the failure to disclose the payment in a timely manner violated his constitutional rights to due process, effective assistance of counsel, and cross-examination, and his rights under Fed.R.Crim.P. 16, which governs discovery. Dennis relies, in part, upon *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). "The rule of *Brady* . . . requires the state to disclose to the defendant all favorable evidence material either to guilt or punishment. Suppression of favorable, material evidence denies a defendants constitutional right to due process." *Barnes v. Lynaugh*, 817 F.2d 336, 338-39 (5th Cir.1987). Evidence is material for these purposes if "there is a reasonable probability that, had the evidence been disclosed

to the defense, the result of the proceeding would have been different." *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985).

Dennis has not shown a *Brady* violation. The payment was disclosed to the defendant and to the jury during trial; especially in light of the relatively unimportant nature of the information vis-a-vis the elements of the offenses, there is no reasonable probability that the jury's verdict would have been different if the information had been disclosed earlier.

Dennis also argues that timely disclosure may have had an impact on the suppression hearing but has not shown a reasonable probability that the result of the hearing would have been different if the payment had been disclosed. As to evaluating Tucker's credibility, the payment was relatively unimportant, as she did not learn about the possibility of receiving it until after she had relayed the information. As to evaluating the officers' credibility, nothing supports Dennis's assertion that they engaged in "secrecy and evasion"; nothing indicates that they knew of the district court's standing order, and testimony indicates otherwise. Moreover, Tucker's testimony provided only a small portion of the basis for district court's ruling on the motion to suppress; the key facts came from the officers' observations after surveillance had begun.

Dennis also relies in part upon *Giglio v. United States,* 405 U.S. 150, 154-55, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). *Giglio* addresses nondisclosure of an agreement or understanding regarding a key witness. *Id.* at 154-55, 92 S.Ct. at 766. But Dennis has not shown that a *Giglio* violation has occurred here, as the agreement or understanding was disclosed to the defense before the end of the trial. *See id.* Dennis cites no authority indicating that a *Giglio* violation can occur when the evidence has been disclosed at trial. In *Hill v. Black,* 887 F.2d 513, 517 (5th Cir.1989, *vacated on other grounds,* ---U.S.---, 111 S.Ct. 28, 112 L.Ed.2d 6 (1990), we indicated that a *Giglio* violation

does not occur when the matter was disclosed to the defense before the end of the trial. We now reaffirm the *Giglio* aspect of *Hill*.

Dennis argues that his rights under *Napue v. Illinois*, 360 U.S. 264, 269-71, 79 S.Ct. 1173, 1177-78, 3 L.Ed.2d 1217 (1959), were violated. *Napue* addresses a prosecutor's knowing failure to correct a witnesses false testimony. *Id.* at 269-71, 79 S.Ct. at 1177-78. Dennis has not shown a *Napue* violation, as he has not established that false testimony was given.

As to Dennis's claim that the lack of a timely disclosure violated his right to effective assistance of counsel,

> The general rule in this circuit is that a claim of ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been raised before the district court since no opportunity existed to develop the record on the merits of the allegations. [This court has] undertaken to resolve claims of inadequate representation on direct appeal only in rare cases where the record allows [us] to evaluate fairly the merits of the claim.

United States v. Higdon, 832 F.2d 312, 313-14 (5th Cir.1987), *cert, denied*, 484 U.S. 1075, 108 S.Ct. 1051, 98 L.Ed.2d 1013 (1988) (citations omitted). Because of the unusual nature of this ineffective assistance claim, however, it can be resolved on direct appeal: Dennis is not claiming that his attorney rendered deficient performance; instead, he is arguing that the government's conduct restricted his attorney's ability to render effective assistance. Therefore, the usual need for developing the record regarding the attorney's version of the events does not exist here.

Even if this claim properly arises under ineffective assistance principles, Dennis is not entitled to relief. To succeed, Dennis would have to show (at least) a reasonable

probability that, but for the untimely disclosure, the result of his proceedings would have been different. *See Strickland v. Washington,* 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). As discussed above, Dennis has not made such a showing. Similarly, to the extent that the lack of a timely disclosure implicates Dennis's right to cross-examination, he has not shown that the district court's judgement should be disturbed.

[12,13] Dennis also has failed to show that he is entitled to relief because of any violation of rule 16. District courts have broad discretion in determining the appropriate sanction for a violation of a discovery order. *United States v. Bentley,* 875 F.2d 1114, 1118 (5th Cir.1989). "In exercising this discretion, the district court should consider factors such as the reasons why disclosure was not made, the prejudice to the opposing party, the feasibility of rectifying that prejudice by granting a continuance, and other relevant circumstances." *Id.* Especially in light of the prosecutor's ignorance of the payment, the relatively low level of prejudice caused by the nondisclosure, and the presentation of the information to the jury, Dennis has not shown that the district court abused its discretion by denying the motion to strike the testimony.

VI.

[14] Dennis contends that the district court allowed the jury to deliberate beyond an eight-hour time period for two successive days, so the verdicts were the product of fatigue, which amounts to coerced verdicts. "The length of time of jury deliberation is a matter of discretion of the trial judge; without more, it cannot constitute coercion." *United States v. Caracci,* 446 F.2d 173, 178 (5th Cir.), *cert. denied,* 404 U.S. 881, 92 S.Ct. 202, 30 L.Ed.2d 162 (1971). The record is not clear on the exact time that the jury returned its verdict; Dennis alleges that it was 9:00 p.m. But the district court had informed the jury that, if it needed a break, it

should so indicate, and a break would be taken. Nothing in the record indicates that the jury did so. Dennis has not shown that the district court abused its discretion regarding the timing of the jury's deliberations or that the verdicts were coerced.

We find no error in the proceedings in the district court. Its judgment, accordingly, is AFFIRMED.